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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 615.

GEORGE T. NISHIDA and JAMES E. NISHIDA, d/b/a Hilo Dairy Company of Kauai, RYOJU SOKEI, d/b/a Sokei Dairy, and FRED L. WALDRON, LIMITED, *Petitioners*,

vs.

E. I. DU PONT DE NEMOURS & COMPANY, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The order (R. 106, App. to Petition 13-A) and opinion (R. 502) of the District Court for the Northern District of Mississippi denying Petitioners' Motion for a New Trial has not been reported. The opinion of the Court of Appeals for the Fifth Circuit (App. to Petition 1-A to 12-A) is reported in 245 F.2d 768.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

While we do not believe that any questions, in a true legal sense, are presented in the state of the record herein, the Petitioners have predicated certain points upon which the Petition is based, and the Respondent must necessarily adapt itself to answer them. Stated briefly, as they appear to Respondent's analysis, these points are:

1. Whether the Court below erroneously applied State law rather than Federal decisions to the interpretation of a Federal statute.

2. Whether the trial Court deprived the Petitioners herein of any legal rights, when it directed liability without regard to the type of violation, whether statutory or common law, and limited the jury's consideration to whether or not that liability had been intercepted by an intervening act, breaking the chain of causation.

3. Whether the trial Court deprived the Petitioners herein of any legal rights when it directed liability without regard to the type of violation, whether statutory or common law, instead of instructing the jury as to the meaning of negligence *per se* and allowing it to consider the existence of actionable negligence under all the circumstances.

4. Whether, under the record in this case, Rule 46, *F.R.C.P.*, excuses the failure to take exceptions to the trial Court's charge under Rule 51, *F.R.C.P.*

5. Whether violations of the Federal Food, Drug and Cosmetic Act are actionable as a new and independent Federal civil cause of action, determinable only by Federal Courts to the exclusion of State law and State Court decisions.

STATUTES AND RULES INVOLVED.

The Respondent does not believe that any statutes are properly involved, under the state of the record herein. As Petitioners present it, however, there is involved:

Federal Food, Drug and Cosmetic Act [June 25, 1938], Chapter 675, Section 1, 52 Stat. 1040, 21 U.S.C., Ch. 9.

Rules 46 and 51, *F.R.C.P.*

Rule 19, Revised Rules of United States Supreme Court.

STATEMENT OF CASE.

The Petitioners devote thirty-six pages to their presentation of the facts with which, except for the addenda hereto and the observation that their presentation is understandably, and within the limits of advocacy, slanted to expound Petitioners' views, the Respondents do not materially disagree. We do point out, however, that in this Petition for a legal review, thirty-one of the thirty-six pages (pp. 5-35, incl.) are directed solely to a factual review of an issue which has been resolved by the jury on the question of proximate causation, and the remaining five pages of their "Statement of Case" (pp. 36-41, incl.) are predicated on Counsel's statement that is admittedly outside the record (Petition, p. 36). Accordingly, while we do not believe a factual review is proper, we submit that, since the Peti-

tioners have proffered these facts to the Court, they should be supplemented by the following addenda.

Respondent has emphatically denied that any sales of tri were made for the purpose of processing soybeans to make cattle feed after the delivery of the warning letter of July 31, 1951, and has denied that it introduced into interstate commerce any tri for that purpose which was used or involved in the meal purchased by the Petitioners herein. R. S. Armstrong testified that the Magnolia plant did not expect to resume operations after his visit to the plant to deliver the letter on August 3, 1951, and that they (Magnolia) were going to look into the possibility of channeling their meal to swine and poultry (R. 427, 434).

Frank L. McDonald, plant manager of the Magnolia plant, which sold the meal that ultimately reached the Petitioners, testified that he left Magnolia's employ on September 24, 1951 (R. 365), and that before he left, he advised the plant management (and sole owners), Messrs. Ford, Reed and Warren, that they should not sell for cattle feed and that Messrs. Ford and Reed assured Mr. Warren that it would be all right (R. 375).

C. B. Shepherd, manager of the Chlorine Products Division of the Respondent, testified that the first rumors of any trouble from the feeding of tri-processed soybean meal to cattle came in the early part of 1950 from Colorado; that investigation of 150 cattle deaths indicated that only 20 had received the tri-processed soybean meal, and that the possibility of tri being a factor was completely rejected by the state veterinarian (R. 450-451). By this time some 60 million pounds of tri-processed meal had been sold throughout the country with no bad results and no complaints—since the opening of several plants right after the War (1944), and increased activity in this field beginning in 1947 (R. 449, 450).

It was also testified that the Respondent called the attention of Lyman Reed, Secretary and Sales Manager of the processing plant Magnolia, to the resolution of the American Feed Control Association, carried in the magazine "Feedstuffs" (D. 9, R. 537), that a label be placed on bags of tri-processed soybean meal to the effect that the meal should not be fed to cattle. Mr. Reed was aware of this resolution and the admonition to so label, and this conversation was before the first shipment of meal that ultimately reached the Petitioners (R. 439, 129).

ARGUMENT.

I.

The Record in This Case Presents Neither the Interpretation of a Federal Statute nor the Application of State Law Thereto.

We respectfully submit that the Petitioners herein err twofold in their presentation of this first point. In the first place, the Federal Food, Drug and Cosmetic Act is not involved, since the trial Court directed the jury to find the Respondent liable unless the chain of causation had been broken by an intervening act of negligence.

In the second place, the Court below expressly stated that it was moot to discuss the applicability of the *Ladner* case [*du Pont de Nemours & Co., E. I.*, v. *Ladner*, 221 Miss. 378, 73 So.2d 240], since it felt there was ample evidence to justify the jury's conclusion that the chain of causation had been broken and the Respondent absolved of responsibility by the intervening act of the ~~possessing~~ processing plant, Magnolia.

The only reference by the Court below to the *Ladner* case was to borrow general principles of law as to what

constituted a breaking of the chain of causation. It is so clear that the Court did not rely upon it as authoritative that we believe further discussion unnecessary. The language of the opinion is entirely expressive (App. to Petition 11-A):

> "There was ample evidence to sustain the verdict for du Pont on the issue of intervening cause. We need not determine whether, had the verdict and judgment been for the appellants, we would be required to reverse under the rationale of the *Ladner* case."*

Quite apart from the negation of the Petitioners' presentation of this point, and while the Court below did not feel bound by nor rely upon the *Ladner* case, the Respondent affirmatively submits as an additional reason for the denial of this Petition that the Court below should have been bound by it under the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), and may have so found had their decision not been based on other grounds.

It is curious and is noted in connection with this affirmative presentation that the Petitioners insist that the Court below felt bound by the *Ladner* decision (Pet. pp. 43, 44). If this were so—Respondents would have been entitled to a directed verdict on its motion and this argument would be unnecessary.

We submit that the only question involved as this case was presented to the jury by the trial Court, with its direction as to liability, was that of proximate cause and intervening act and that this is a composite of law and fact. There must be first an acceptance of the legal theory that a legally sufficient intervening act absolves an original tortfeasor, and second, an interpretation as to what constitutes

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*Italics ours.

a legally sufficient intervening act. The first is a pure legal theory; the second is a determination as to the quantum of fact required to set the first in motion.

We are satisfied that Petitioners will concede that Hawaii accepts the doctrine of proximate cause and intervening act. In fact, Petitioners, on pp. 56, 57 of the Petition, cite and quote the case of *Ward* v. *Inter-Island Navigation Co.*, 22 Haw. 66, 488, recognizing these principles. This case also holds:

> "We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. *In such a case the resort of the sufferer must be to the originator of the intermediate cause* * * *. *The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating which produced the injury.*
>
> "The crucial question, the pivotal fact, in the case at bar is, therefore, whether the primary fault, the negligence of the defendant, and the injury of the plaintiff are naturally and probably connected with each other by a continuous sequence, or dissevered by a new and independent agency." [Emphasis ours.]

The inescapable conclusion—one that could have been anticipated in the common law jurisdiction of Hawaii—that Hawaii accepts the doctrine establishes that its law is the same as that of Mississippi. Assuming Petitioners can evade the *presumption* of similarity, we necessarily arrive at the *actuality* of similarity as established by the law itself. In either event, the result as to the legal theory is the same —*i.e.*, that under either approach it must be conceded that

the legal doctrine of the intervening act is applicable to the instant case.

This leaves only the factual aspect of the doctrine to be considered—*i. e.*, what quantum of fact is necessary to constitute a legally sufficient intervening act—and we respectfully submit that as to this there was nothing left to decide. The *Ladner* case eloquently holds—in the pronouncement of the Supreme Court of Mississippi—that the identical quantum of facts herein considered, *as a matter of law* and contrary to the jury's finding, constitute a legally sufficient intervening act.

Once having established that Hawaii accepts the principle, can it be reasonably argued that Hawaii would find differently as to the quantum of fact? Is there any question but that this facet of the doctrine—*i.e.*, the fact side—must be considered *stare decisis*? We respectfully submit that, with the Supreme Court of Mississippi having concluded by unanimous opinion that a certain set of facts constitute—as a matter of law—a legally sufficient intervening act, and with it clear that the doctrines of proximate cause and intervening act are applicable, the United States Court sitting in the same state should have accepted that finding as conclusive, under the *Erie* v. *Tompkins* case.

Putting it another way, and in some repetition, the Supreme Court of Mississippi has decided unanimously that the undisputed fact of the warning given to Magnolia by means of du Pont's letter of July 31, 1951, and Magnolia's sales of meal several months thereafter, is sufficient proof of an intervening and independent act, so as to break any possible chain of causal relationship between du Pont and the alleged damages of the Petitioners and thus to relieve du Pont from any legal liability to ultimate consumers of

the meal, whether they be Frank Ladner or the Petitioners herein.

Perhaps the most cogent expression of these conflicts principles appeared in the Mississippi case of *United States Fidelity and Guaranty Co.* v. *Yost*, 183 Miss. 65, 183 So. 260 (1938), suggestion of error overruled at 185 So. 564, where the Mississippi Supreme Court, in applying the substantive law of Tennessee, expressly held that the "quantum of proof required," i.e., the factual evidence necessary to warrant the application of a principle of substantive law, is governed by the law of the forum, Mississippi.

It is clear that even though the substantive rights of the parties are controlled by the law of the place of the injury, adjective rights, pertaining to remedy and including rules of evidence and proof, are controlled by the law of the forum. *Booth* v. *Teche Lines*, 165 Miss. 343, 143 So. 418 (1932); *Interstate Life and Accident Co.* v. *Pannell*, 169 Miss. 50, 152 So. 635 (1934).

We believe it to be entirely clear that, under the general common law and under the laws of Hawaii, the rule of negligence law to the effect that an original *tort-feasor* may be immunized from legal liability for his acts where there have been intervening and separate acts of negligence by others is well recognized. But the *quantum of proof or fact* which is deemed sufficient to warrant bringing into operation the "intervening act" principle of negligence law is to be determined not by the law of the "foreign" state but by the law of the forum. *Booth* v. *Teche Lines*, *supra*, and *U. S. Fidelity & Guaranty Co.* v. *Yost*, *supra*.

When there is a conflict of laws presented in a case, then the question is presented as to the substantive law of which state concerned should be applied. This Honorable Court, in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313

U.S. 487 (1941), faced the question as to whether the Federal Courts must follow conflict of laws rules prevailing in the states in which they sit. The question presented there was whether a New Jersey concern was liable for damages for interest on a judgment under a New York statute requiring said interest when the subject damages accrued. The suit was filed in the Federal Court in Delaware. The Supreme Court stated that the conflict of laws rule of Delaware should be applied since the suit was filed in the Delaware Federal Court, the Court stating:

> "We are of opinion that the prohibition declared in Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817, 114 A.L.R. 1487, against such independent determinations by the federal courts extends to the field of conflict of laws. *The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in co-ordinate state and federal courts sitting side by side.*"*

This Court mentioned, in the last cited case, the case of *Sampson* v. *Channell*, 110 F.2d 754 (C.A. 1st, 1940), cert. denied 310 U.S. 650, wherein a car driven by defendant's testator collided with a car driven by plaintiff, injuring the plaintiff and his wife. The wife recovered judgment in the United States District Court of Massachusetts, and the husband sought a similar judgment and sought to have the Federal Court enforce the Massachusetts rule that contributory negligence places the burden of proving the lack of care on the part of the plaintiff on the defendant. The lower court declined to do so, following the Maine law; on appeal to the Court of Appeals for the First Circuit, said Court was of the opinion that the District Court should

*Emphasis ours

have followed the Massachusetts rule for the reason that Federal Courts must follow state conflict of laws rules because they are parts of the substantive law, and further, that the conflict of laws rule of a state must be followed even though the state court has said that a part of the rule is substantive and another part is procedural. The Court of Appeals stated:

> "* * * If the Federal court in Massachusetts on points of conflict of laws may disregard the law of Massachusetts as formulated by the Supreme Judicial Court and take its own view as a matter of 'general law', then the ghost of Swift v. Tyson, supra, still walks abroad, somewhat shrunken in size, yet capable of much mischief. In the case at bar, it is difficult to see that any gain in the direction of uniformity would be achieved by creating a discrepancy between the rules of law applicable in the Massachusetts state and Federal courts, respectively, in order to bring the law of the Massachusetts Federal court in harmony with the law that would be applied in the state courts of Maine.
>
> "Our conclusion is that the court below was bound to apply the law as to burden of proof as it would have been applied by the state courts in Massachusetts."

Summarizing, we believe the factors that have been established are:

1. That Hawaii accepts the doctrine of the "intervening act."

2. That the legal substantive principle, under proper proof, is controlled by the law of the place where the injury occurred (Hawaii).

3. That the quantum of fact necessary to constitute a legally sufficient intervening act is controlled by the law of the state in which the action is tried (Mississippi).

4. That whether the alleged violation is common law or statutory, a legally sufficient intervening act immunizes the original tort-feasor.

5. That the Mississippi Supreme Court has ruled, as a matter of law, that the identical controlling facts herein under consideration constitute a legally sufficient intervening act.

II.

The Petitioners Were Accorded the Ultimate When the Trial Court Directed the Jury to Find Liability Unless Causal Relation Was Negated by an Intervening Act; That Issue of Liability Was Thus Removed from the Case and the Basis of Liability Therefore Needed No Clarification by Instruction.

We respectfully submit that, under the above heading, inasmuch as questions 2 and 3 of the Petition are so akin to each other, they are both resolved by the argument herein.

We do not believe it an over-simplification to say that —in the trial of this cause—Petitioners had two, and only two, problems (exclusive of the amount of damages) to face. These were: (1) The establishment of negligence of the Respondent, and (2) The establishment that the predicate for such negligence was the proximate cause of their damage.

The trial Court—as a matter of law—resolved the first problem in the Petitioners' favor by directing the jury to find liability unless the second was answered in the negative. In adopting Petitioners' requested Instruction No. 10, it directed the jury as follows:

"If you should believe from a preponderance of the evidence in this case, that the defendants sold tri

solvent to the Magnolia Soy Products Company knowing that it was to be used by that company in the manufacture of soybean oil for sale in Interstate Commerce as cattle feed, and that the action of the defendants prior to the sale of the soybean meal which was ultimately purchased by plaintiffs and used in feeding their cattle, or prior to the time when they received the same in the Territory of Hawaii, were not such as would have caused a reasonably prudent man to desist in selling such meal for cattle feed, or was such that a reasonably prudent man in the position of the defendant knew, or should have known that the said company, that is, referring to Magnolia Soy Products Company, would continue to sell said meal in Interstate Commerce for cattle feed and would not have regarded the sale of this meal, tri meal, for cattle feed by said company, again referring to the Magnolia Soybean Products Company, as extraordinary under the circumstances, then your verdict would be for the plaintiff." (R. 485).

It should also be noted that the actions of Respondent du Pont which the Court directed the jury to consider were not confined simply to the letter delivered August 3, 1951, or those immediately surrounding the same, because the above language includes the words "that the action of the Respondent *prior* to the sale of the soybean meal which was ultimately purchased by plaintiffs and used in feeding their cattle, or *prior* to the time when they received the same in the Territory of Hawaii, were not such as would have caused a reasonably prudent man to desist in selling such meal for cattle feed", etc. Therefore, from the time alluded to by the trial Court, we have all time antedating the delivery and use of the meal in Hawaii. Certainly this broad expanse of time is ample to cover every act done or omitted to be done by du Pont on the question of causation or of intervening cause.

The Court of Appeals was correct in holding that the Federal Act was completely immaterial. It pointed out, in effect, that the lower court had given a peremptory instruction for the plaintiffs (Petitioners here), save and except only for the determination by the jury as to the "break of the chain of causation" or the decision as to the issue of intervening cause. A recitation of the provisions of the Federal Act would have been entirely useless and meaningless to the jury, whether the Court concluded thereafter by stating that any violations constituted "negligence *per se*", or even had the trial Court said that there was a case of absolute liability against du Pont unless the jury believed that the chain of causation was broken or that the intervening cause was efficacious under the law.

It is axiomatic that negligence is never actionable unless the same proximately cause or contribute to the injury or damage of a claimant. It remains simply an abstract term and nothing more. There must be the finding by the jury or the court of the existence of the nexus of "proximate causation" between a claimant's damage and the negligence, act or omission of another, whether the latter be designated as "negligence *per se*", "*prima facie* negligence", "absolute liability", or the like. This is not a *general* principle of law, but a *universal* principle of law. This is so, whether the negligence is one under the common law or declared by statute or ordinance.

65 *C.J.S.*, Negligence, Section 105, p. 654, states in part:

> "The rule that no liability attaches unless it appears that there was a causal connection between the negligent act or omission charged and the injury, discussed supra, Section 104, is applicable where the act or omission complained of constituted a violation of some statute or ordinance, even though such violation constitutes negligence per se or is prima facie evidence of negligence."

The requirement of the existence of "proximate cause" in affixing liability for a tortious injury is "one of universal application", as held in 86 *C.J.S.*, Torts, Section 27, p. 941, which states in part:

> "In determining liability for a tortious injury, the law looks only to the act or omission from which the result follows in direct sequence without the intervention of a voluntary independent cause and declines to permit further investigation into the chain of events, and, unless the act complained of is the proximate cause of the injury, there is no legal liability. The rule is one of universal application * * *."

We analogize the provisions of the Federal Food, Drug and Cosmetic Act with the Federal Safety Appliance Act, the latter of which declares it to be unlawful for any common carrier engaged in interstate commerce by railroad to haul or to permit to be hauled or used on its lines certain equipment on cars moving in interstate traffic, and as to which the United States Supreme Court has held that the Federal Safety Appliance Act imposes an absolute duty on the railroad. The Supreme Court, as to said Appliance Act, in *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U.S. 430 (1949), at 434, said the violation of said Act is sometimes described as "negligence *per se*", but that:

> "* * * we have made clear in the O'Donnell case that that term is a confusing label for what is simply a violation of an absolute duty."

In that same case, the Court, however, held that still proximate causation must be shown in order to affix liability, and that a simple showing of a violation of the Act does not automatically entitle a person to damages, as observed from the following excerpt:

> "Once the violation is established, only *causal* relation is in issue." (Emphasis ours).

As to said Federal Safety Appliance Act, *Davis, etc.*, v. *Wolfe*, 263 U.S. 239, 243 (1923), clearly holds that unless the evidence show proximate causation, no verdict can stand, and that if the evidence merely show a failure to comply with the Act and that said failure merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury, the suit is not maintainable, all as shown by the following excerpt:

> "The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; * * *."

We submit that the Respondent, and not the Petitioners, can rightfully complain of the trial Court's action in issuing a peremptory instruction on liability and leaving only proximate cause to be considered by the jury. Since that error has been made harmless by the jury verdict, it need not be discussed at length here. Suffice it to say, that even on liability the proof was entirely lacking to make it other than a jury question, in that:

1. There was no proof that any tri remained in the meal.

2. There was no proof that the *use* of a processing agent (tri) which is entirely consumed in the manufacture of the meal *comes* within the terms of the Federal Food, Drug and Cosmetic Act.

3. There was no proof that the sales involved herein were made of meal manufactured by the use of Respondent's tri sold for that purpose; in fact, the proof is to the direct contrary (R. 427, 434).

4. It was a jury question as to whether the Respondent induced the vendor of the meal (Magnolia) to enter into the use of tri for processing soy bean meal for cattle feed, except on his own judgment and after all the facts had been revealed (Ex. D-4, R. 510).

5. There was no proof in the record that tri was a poison; in fact, Petitioners' expert, Dr. Raymond T. Vaughn, testified to the contrary (R. 340, 341, 348, 349).

6. There was no proof in the record that tri-processed meal, under all circumstances and *per se*, was toxic, in view of the testimony that some 60 million pounds had been sold without incident (R. 449, 450), and the testimony of Dr. Vaughn that many variables were involved, such as heat, the age of the bean, etc. (R. 347, 352) which are related to the toxicity or lack of it in the ultimate meal.

III.

Petitioners Were Well Aware That the Court Had Declined Their Requested Instructions (Except Instruction No. 10) in Haec Verba and Took No Exception, Except to the Failure to Instruct on Prospective Profits (Instruction No. 18); Having Taken No Exception, They Are Now Precluded from Raising This Refusal under Rule 51, F.R.C.P.

While we vehemently disagree with the recitation in the Petition as to the circumstances of the conference in chambers prior to the charge to the jury (Petition p. 36), which is admittedly outside the record, we will not add to the impropriety by submitting our version.

There can be no question, however, but that the Petitioners heard the entire charge, knew its contents, heard the Court ask: "Are there any exceptions or objections, gentlemen, to the charge as given, or any requests for ad-

ditional instructions?" (R. 490), to which Mr. Brooks, of Petitioners' Counsel, replied: "May we have two or three minutes, Your Honor, for a brief consultation.", and later, after further discussion in chambers, upon Mr. Thomas's statement, "I believe the Court asked if there were any objections or exceptions", Mr. Brooks said, "That is correct; you go ahead." (R. 492).

Following this (R. 494), Mr. Tavares raised the only exception taken by the Petitioners, as follows: "For the record, Your Honor, may we most respectfully raise the question of law by excepting to the Court's ruling, ruling out possible prospective profits."

As the concluding admonition to the jury—after the arguments of Counsel—the Court reiterated its charge as previously given, with several minor corrections, not pertinent here (R. 497-499).

The applicable law is clear and has been repeatedly pronounced. In *Palmer et al., Trustees for the New York, New Haven & Hartford Railroad Co.* v. *Hoffman, Individually and As Administrator*, 318 U.S. 109, at 119 (1943), the Supreme Court said:

> "* * * As we have noted, petitioners in their exceptions to the charge given and in the requested charge did not differentiate between the causes of action based on the Massachusetts statute and those on the common law. * * * Under these facts a general exception is not sufficient. In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial." (Citing additional cases).

Following the above rule, the Court below in this case cites and quotes one of its own opinions, viz. *Good Holding Co.* v. *Boswell,* (5th Cir., 1949) 173 F.2d 395, 401, wherein it held:

> "We further find that the oral charge of the Court, when fairly considered in its entirety, substantially preserved all material issues in the case for the consideration of the jury. In any event, although adequate opportunity was had to challenge the oral charge, no exceptions were taken, and the Court may not now be put in error in this regard."

In conclusion on this point, we respectfully submit that both from the record and the state of the law, Petitioners were entirely satisfied with the charge, except as to the question of prospective profits (and this goes only to the amount of damages), and their present position is born of surprise and dissatisfaction with the jury verdict, whereby they now attempt to raise questions that were not properly preserved at the time of the trial.

IV.

Assuming Arguendo That the Federal Food, Drug and Cosmetic Act Created at Its Passage a New and Independent Federal Civil Cause of Action, We Submit That This Is in No Way Pertinent to the Issues in This Case.

As previously urged under point I, we contend that this matter does not embrace the interpretation of any Federal Statute, and specifically the Federal Food, Drug and Cosmetic Act, but presents solely a question of proximate causation and intervening act. However, we now proceed to meet the presentation of the Petitioners herein—despite the impression of non-relevancy.

It is respectfully contended that, even conceding the major premise of the Petitioners that a new cause of action is created by the Act, nothing is added by this theory nor is anything taken away from the state of the law as it has existed since the passage of the Act and throughout the legion of decisions of both Federal and State Courts interpreting it.

Petitioners concede that there is no authority for this proposition and in the absence of authority we are unable to entirely comprehend the rationale of this point. If it is meant that the determination of questions under the Act should be relegated to Federal Courts alone we submit that the introduction of it into this case—where the matter arose in the Federal District Court for Northern Mississippi, was appealed to and decided by the Court of Appeals for the Fifth Circuit—is completely beyond comprehension in view of the strictly Federal jurisdictional periphery surrounding this case.

If it is meant to imply that the District Court or the Court of Appeals applied the reasoning of the State Supreme Court in the *Ladner* case, that is belied in the opinion of the Court of Appeals as argued hereunder in point I, and was never a part of the District Court's action.

If it is meant to imply that henceforth this Honorable Court should restrict the interpretation of the Federal Food, Drug and Cosmetic Act to Federal Courts and in some way create a set of rules for universal guidance, we submit that this is neither an issue in the instant case nor is it conceivable for future cases that—without legislative fiat—State Courts should be deprived of the right to decide such questions involving Federal statutes such as the Federal Food, Drug and Cosmetic Act, the Employers Liability Act, the Fair Labor Standards Act, and others.

If it is meant that, for the first time since the passage of the Act in 1938, a new and independent civil cause of action—in some inexplicable way cognizable only in the Federal Courts—is created after twenty years of decisional and administrative law, in cases before the Food and Drug Administration, the various State Courts, both lower and appellate, and the Federal Courts, we find neither a basis for such naissance nor an excuse for its delay.

CONCLUSION.

In summary, we submit that Petitioners have entirely failed to present reasons or grounds within the provisions of Rule 19, Supreme Court Rules, to warrant a review on certiorari.

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Earl T. Thomas,

Carl E. Geuther, By J.

Carl E. Geuther,
Counsel for Respondent.

CERTIFICATE OF SERVICE.

I, Earl T. Thomas, one of the Attorneys of, and of Counsel for, the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this, the below-noted date, I served true copies of the above and foregoing Brief for Respondent in Opposition on Petitioners, by mailing on this date such

true copies respectively, in duly and properly addressed envelopes, with first class, air mail postage prepaid, to Petitioners' respective Attorneys, as follows:

To: Roger E. Brooks, Esq.
923 20th Street, N. W.
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This December 11, 1957.

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